

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ISABEL SANTOS, individually and as)	Case No. 12-3296-SC
trustee and beneficiary of the)	
Yolanda Maria Santos Trust,)	ORDER DENYING MOTION FOR
)	<u>CIVIL CONTEMPT SANCTIONS</u>
Plaintiff,)	
)	
v.)	
)	
REVERSE MORTGAGE SOLUTIONS, INC.;)	
NDEX WEST, LLC; and DOES 1 through)	
20,)	
)	
Defendants.)	
)	

I. INTRODUCTION

Now before the Court is Plaintiff Isabel Santos's ("Plaintiff") motion for civil contempt sanctions. ECF No. 53 ("Mot."). Santos asserts that Defendants Reverse Mortgage Solutions, Inc. ("RMS") and NDEX West, LLC ("NDEX") (collectively, "Defendants") violated a preliminary injunction enjoining the sale of Plaintiff's home by, inter alia, sending Plaintiff sixty-four separate notices of sale in the last several months. The Motion is fully briefed, ECF Nos. 49 ("Opp'n"), 53 ("Reply"), and appropriate for determination without oral argument per Civil Local Rule 7-1(b). For the reasons set forth below, the Motion is DENIED. However, the Court orders Defendants to cease and desist much of

the conduct described below.

II. BACKGROUND

In June 2009, Plaintiff's mother, the late Yolanda Maria Santos, took out a federally insured reverse mortgage loan secured by her residence at 930 Santa Cruz Drive, Pleasant Hill, California (the "Property"). On or around February 7, 2011, Yolanda Maria Santos died. Plaintiff alleges that, following her mother's death, she continually attempted to enter into a payment plan that would pay off the reverse mortgage loan and allow her to purchase the Property. Plaintiff further alleges that RMS unlawfully refused to permit her to purchase the Property and instead insisted that the Property either be foreclosed or sold to some third party. NDEX began foreclosure proceedings in February 2012.

On June 8, 2012, three days before the scheduled trustee's sale of the Property, Plaintiff filed a complaint in the California Superior Court by and for Contra Costa County - Martinez (the "state court"), asserting four causes of action: (1) breach of contract, (2) declaratory relief, (3) slander of title, and (4) cancellation of written instruments pursuant to California Civil Code section 3412. On June 26, 2012, the state court issued a tentative ruling granting Plaintiff's motion for a preliminary injunction. ECF No. 18-5 at 1. Two days later, on June 28, the state court affirmed its tentative ruling and issued a preliminary injunction, which provided: "Defendants and their employees, agents, and persons acting with them or on their behalf are enjoined and restrained from selling, transferring any ownership

1 interest in or further encumbering the property" Id. at 1-
2 2.

3 On June 26, the same day the state court issued its tentative
4 ruling, Defendants filed a notice of removal in federal court. ECF
5 No. 1. The Court takes judicial notice of the fact that Defendants
6 did not file a copy of the notice of removal with the clerk of the
7 state court until July 3, 2012. Soon after the case was removed,
8 Defendants moved for the Court to dissolve the preliminary
9 injunction entered by the state court. ECF No. 12. That motion
10 was denied on October 12, 2012. ECF No. 25 ("Oct. 12 Order"). The
11 Court concluded: "By failing to identify any relevant change in law
12 or circumstance, Defendants fail to persuade the Court that it
13 should reconsider the state court's earlier entry of a preliminary
14 injunction, including the state court's decision to do so without
15 requiring a bond." Id. at 15-16.

16 Plaintiff now claims that Defendants engaged in a pattern of
17 harassment after the state court entered the preliminary injunction
18 and this Court refused to dissolve it. This pattern began on
19 September 13, 2012, when Plaintiff was contacted by an appraiser
20 whom RMS sent to do an interior appraisal of the house. ECF No. 36
21 ("Pl.'s Decl.") ¶ 8. Plaintiff's counsel, Daniel J. Hanecak
22 ("Hanecak"), subsequently informed Defendants that they should
23 contact him before attempting to inspect or appraise the Property.
24 ECF No. 43 ("Hanecak Decl.") ¶ 4, Ex. 1. Defendants apparently
25 ignored this request, as Plaintiff was contacted by another
26 appraiser on February 20, 2013, and, on June 30, 2013 a man visited
27 Plaintiff's home at 8:45 p.m. to take photos for "the bank." Pl.'s
28 Decl. ¶ 12; ECF No.53-1 ("Pl.'s Supp. Decl.") ¶ 3.

1 Defendants have also sent Plaintiff a deluge of notices in the
2 last several months. On January 11, 2013, Plaintiff received
3 sixteen notices of postponement of the trustee's sale from NDEX.
4 The notices were addressed to her deceased mother and stated:

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6 You are hereby notified that the . . . Trustee's Sale
has been postponed to 02/11/2013 YOU MAY NOT
7 RECEIVE WRITTEN NOTICE OF POSTPONEMENT EACH TIME THE
TRUSTEE'S SALE IS POSTPONED UNLESS YOU TAKE
8 ACTION TO PROTECT YOUR PROPERTY, IT MAY BE SOLD AT A
PUBLIC SALE WITHOUT FURTHER NOTICE.

9
10 On February 11, 2013, Plaintiff received another sixteen notices of
11 postponement, stating that the trustee's sale had been postponed
12 another month, to March 11, 2013. Other than the listed dates, the
13 February 11, notices were identical to the January 11 notices.
14 NDEX continued to send notices in March and April 2013. In four
15 months, Plaintiff received sixty-four notices of postponement from
16 Defendant. The letters continued even after Plaintiff's counsel
17 requested that Defendants cease and desist. See Hanecak Decl. Ex.
18 2.

19 Additionally, Plaintiff complains that she continues to
20 receive phone calls from interested buyers because the sale of her
21 home is listed as "active" on foreclosureradar.com. Plaintiff
22 states that buyers call on a weekly basis and sometimes drive by
23 the house and take photographs.

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25 **III. LEGAL STANDARD**

26 Federal courts "have inherent power to enforce compliance with
27 their lawful orders through civil contempt." Spallone v. United
28 States, 493 U.S. 265, 276 (1990) (quotations omitted). The party

1 moving for sanctions "has the burden of showing by clear and
2 convincing evidence that the contemnors violated a specific and
3 definite order of the court." Stone v. City & Cnty. of San
4 Francisco, 968 F.2d 850, 856 n.9 (9th Cir. 1992). "The burden then
5 shifts to the contemnors to demonstrate why they were unable to
6 comply. . . . They must show they took every reasonable step to
7 comply." Id. (internal citations omitted).

8 9 **IV. DISCUSSION**

10 Plaintiff argues that Defendants violated the state court's
11 preliminary injunction, as well as the Court's Order declining to
12 dissolve the preliminary injunction, by (1) sending Plaintiff
13 sixty-four letters noticing a sale of the Property over the course
14 of four months, (2) calling Plaintiff to schedule interior
15 appraisals of the Property on multiple occasions, and (3) listing
16 the sale of the Property as active on foreclosureradar.com.

17 Defendants respond that the state court had no jurisdiction to
18 issue the preliminary injunction, reasoning that the case was
19 removed before the injunction could take effect. Opp'n at 7. This
20 argument lacks merit. The state court issued a tentative ruling on
21 June 26 and entered a final order on the preliminary injunction on
22 June 28. While Defendants filed a notice of removal in federal
23 court on June 26 (the same day as the tentative order), they did
24 not file a copy of the notice of removal with the state court until
25 July 3.

26 The removal statute provides that "promptly" after filing the
27 notice of removal, a defendant "shall give written notice thereof
28 to all adverse parties and shall file a copy of the notice with the

1 clerk of such State court, which shall effect the removal and the
2 State court shall proceed no further unless and until the case is
3 remanded." 28 U.S.C. § 1446(d). Pursuant to § 1446(d), the state
4 court retained concurrent jurisdiction over the action until
5 Defendants (1) filed the notice of removal in federal court, (2)
6 gave notice to Plaintiff, and (3) gave notice to the state court.
7 See Gutierrez v. Empire Mortgage Corp., CVF10-0079 AWI GSA, 2010 WL
8 1644714, at *2 (E.D. Cal. Apr. 21, 2010); Miller v. Aqua Glass,
9 Inc., CIV. 07-3088-CL, 2008 WL 2854125, at *2 (D. Or. July 21,
10 2008).

11 Thus, the preliminary injunction took effect six to eight days
12 before state court was divested of jurisdiction. To the extent
13 that Defendants removed to avoid the state court's preliminary
14 injunction, they have engaged in improper (and unsuccessful) forum
15 shopping. If there was any ambiguity about whether the state
16 court's preliminary injunction remained in force, it was resolved
17 by the Court's October 12 Order, which denied Defendants' motion to
18 dissolve the injunction.

19 Defendants further argue that Plaintiff's motion for sanctions
20 is untimely. Opp'n at 6. This argument is also unavailing. The
21 evidence shows that Plaintiff's counsel attempted to resolve this
22 matter informally, before appealing to the Court for relief. This
23 was good sense, not delay. In any event, Plaintiff's motion was
24 filed on May 14, 2013, only one month after Plaintiff received
25 foreclosure notices forty-nine through sixty-four.

26 Finally, Defendants contend that they did not violate the
27 preliminary injunction since the injunction only prohibits the sale
28 of the Property. Id. at 5. Defendants argue that they merely

1 maintained the status quo by postponing the sale pursuant to
2 California Civil Code section 2924g(c)(1)(A), which provides that
3 the "trustee shall postpone the sale . . . [u]pon the order of any
4 court of competent jurisdiction." Id. Defendants also argue that
5 they were required to provide Plaintiff's deceased mother with
6 written notices of the postponements pursuant to the Civil Code
7 section 2924(a)(5). Section 2924(a)(5) provides that whenever a
8 sale is postponed for a period of at least ten days, written notice
9 shall be provided to the borrower.

10 Defendants have a point. Nothing in the preliminary
11 injunction expressly prohibits them from postponing the sale or
12 noticing that postponement. For that reason, the Court DENIES
13 Plaintiff's motion for civil contempt sanctions. However, while
14 Defendants may have complied with the letter of the law, they
15 appear to have done so in a manner calculated to harass Plaintiff.
16 Even if Defendants were required to send Plaintiff's deceased
17 mother a notice of postponement, there was no reason for Defendants
18 to send sixteen notices per month, month after month. Nor does the
19 Court see any purpose in postponing the trustee's sale from month
20 to month when the trial in this matter is set for November 18,
21 2013.

22 To avoid any further harassment of Plaintiff, the Court ORDERS
23 Defendants to postpone the trustee's sale of the Property to
24 sometime after December 1, 2013. The trustee's sale shall be
25 postponed again if the trial in this matter is continued.
26 Defendants may notify Plaintiff (or attempt to notify her deceased
27 mother) of the postponement in a manner consistent with their
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1 obligations under California law; however, they shall not send any
2 more notifications than are necessary.

3 The Court further ORDERS that Defendants and their employees,
4 agents, and persons acting with them or on their behalf shall not
5 visit the Property for any purpose without first coordinating with
6 Plaintiff's counsel. As discussed above, the state court's
7 preliminary injunction shall remain in effect during the pendency
8 of this action or until the injunction is dissolved by the Court,
9 and any attempt by Defendants to sell, transfer, or encumber the
10 Property in the meantime shall constitute a violation of that
11 injunction. Failure to comply with this Order or the preliminary
12 injunction, or any future attempts to harass Plaintiff in
13 connection with the threatened foreclosure of the Property will
14 result in sanctions. Since there is no indication that Defendants
15 have any control over foreclosureradar.com, the Court declines to
16 issue an order relating to the website.

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1 **V. CONCLUSION**

2 For the foregoing reasons, Plaintiff Isabel Santos's motion
3 for civil contempt sanctions is DENIED. The Court hereby ORDERS
4 that Defendants shall postpone the trustee sale of the Property to
5 some date after December 1, 2013. The Court further ORDERS that
6 Defendants and their employees, agents, and persons acting with
7 them or on their behalf shall not visit the Property for any
8 purpose without first coordinating with Plaintiff's counsel.
9 Defendants shall also comply with the other requirements set forth
10 in Section IV supra.

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12 IT IS SO ORDERED.

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14 Dated: July 22, 2013

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16 UNITED STATES DISTRICT JUDGE
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